

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP2496
STATE OF WISCONSIN**

Cir. Ct. No. 2009CV106

**IN COURT OF APPEALS
DISTRICT II**

COLONIAL SAVINGS, F.A.,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY H. GENS AND LAURA A. GENS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Timothy and Laura Gens appeal pro se from a judgment entered in favor of Colonial Savings, F.A. Although the Genses raise numerous arguments on appeal, the dispositive issue is whether Colonial Savings was entitled to summary judgment in this foreclosure action. For the reasons that follow, we affirm.

¶2 In April 2001, the Genses executed and delivered to First Federal Savings Bank, La Crosse-Madison a promissory note for \$198,000. The note was secured by a mortgage on real estate in Walworth County. Both the note and mortgage were subsequently transferred to Colonial Savings.

¶3 In August 2007, Colonial Savings filed a foreclosure action against the Genses. That action was resolved via a stipulation and order in August 2008, whereby the Genses agreed to pay Colonial Savings \$35,872.34 so that they could maintain ownership of the real estate. The Genses also agreed to the following language waiving potential claims against Colonial Savings:

The Defendants waive, release and forever discharge all denials, affirmative defenses, claims and counterclaims or any other causes of action which now exist, whether known or unknown against Colonial Savings, F.A., its employees, agents, attorneys, affiliates or subsidiaries which in any way relate to or arise from the underlying loan transaction, discussions, actions or events between the parties through the date of this Stipulation which could have been pled or included as part of this pending action.

¶4 In January 2009, following a default by the Genses, Colonial Savings filed a second foreclosure action. It subsequently moved for summary judgment. The Genses responded with a cross-complaint alleging 15 causes of action.¹

¶5 The second foreclosure action was delayed for several years due to three bankruptcy petitions filed by Laura Gens and two unsuccessful attempts by the Genses to remove the matter to federal court. Eventually, the action was able

¹ The Genses later agreed to voluntarily dismiss the cross-complaint without prejudice.

to resume, allowing the circuit court to hold a hearing on Colonial Savings' motion for summary judgment.

¶6 Three days prior to the summary judgment hearing, the Genses faxed a request for telephonic appearance. The circuit court denied it. The Genses then moved for reconsideration, citing their desire "to give further testimony." The court again denied the request, noting that the summary judgment hearing was "really not a fact hearing."

¶7 At the summary judgment hearing, Colonial Savings relied on an affidavit of foreclosure specialist Nancy Drago, averring that it was the mortgagee of record and the holder or bearer of the note. The affidavit further averred that the Genses were in default. The circuit court concluded that the Genses failed to submit any evidence to the contrary. Accordingly, it granted Colonial Savings' motion for summary judgment. This appeal follows.

¶8 We review a grant of summary judgment using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).²

¶9 On appeal, the Genses contend that the circuit court erred in granting Colonial Savings' motion for summary judgment. Principally, they complain that (1) Colonial Savings was not the holder or bearer of the note; (2) the note was not authentic; (3) the circuit court violated the Genses' due process rights when it

² All references to the Wisconsin Statutes are to the 2011-12 version.

denied their motion to appear telephonically at the summary judgment hearing; and (4) the Genses' statutory right of redemption requires vacating the foreclosure judgment.³

¶10 With respect to the first two complaints, we conclude that the Genses waived them by virtue of their stipulation following the first foreclosure action. Again, in that stipulation, the Genses agreed to waive all claims against Colonial Savings that related to the underlying loan transaction or events occurring before the date, which was August 2008. That waiver defeats the arguments that Colonial Savings was not the holder or bearer of the note and that the note was not authentic.

¶11 With respect to the third complaint, we are not persuaded that the circuit court violated the Genses' due process rights when it denied their motion to appear telephonically at the summary judgment hearing. As noted by the circuit court, the summary judgment hearing is "really not a fact hearing"; thus, the Genses' desire "to give further testimony" by telephone was inappropriate. Even if the circuit court could hold an evidentiary hearing on a motion for summary judgment, the Genses do not explain what new facts they would have raised or how those facts would have affected the circuit court's decision.

³ The Genses also make arguments relating to the timing of Colonial Savings' motion for summary judgment and the validity of its assignment of mortgage. We decline to address the argument relating to the timing of Colonial Savings' motion, as it was not raised in the circuit court. See *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177. Meanwhile, we conclude that any argument regarding Colonial Savings' assignment of mortgage is irrelevant because Colonial Savings proved its right to enforce the note. See *Dow Family, LLC v. PHH Mortg. Corp.*, 2013 WI App 114, ¶34, 350 Wis. 2d 411, 838 N.W.2d 119.

¶12 Finally, with respect to the fourth complaint, it is true that the Genses have a statutory right of redemption before confirmation of sale. *See* WIS. STAT. § 846.13. However, a right of redemption does not affect a foreclosure judgment’s validity. In any event, the circuit court judgment acknowledges the Genses’ right of redemption.

¶13 In the end, we are satisfied that the Genses established no genuine issues of material fact and that Colonial Savings was entitled to judgment as a matter of law. Accordingly, we affirm the judgment of the circuit court.⁴

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ To the extent we have not addressed an argument raised by the Genses on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

